

SENATE NATURAL RESOURCES
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SB 248

Montana-U.S. Forest Service Compact

SB 248

Senate Natural Resources and Energy Committee

Prepared by Montana Reserved Water Rights Compact Commission

January 19, 2007

SB 248 – FACT SHEET

MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION – UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE WATER RIGHTS COMPACT

INTRODUCTION

Since 1992, the Montana Reserved Water Rights Compact Commission (RWRCC) and the United States Department of Agriculture, Forest Service (Forest Service) have been in active negotiations concerning federal reserved water rights on National Forest System lands in Montana. In the fall of 2005, the RWRCC and the Forest Service hired a mediator to assist with the negotiations and have reached a settlement (Compact) to present to the Legislature.

BACKGROUND

The RWRCC was created by the Montana Legislature in 1979 to act on behalf of the State to negotiate settlement of federal reserved water right claims as part of the state-wide water adjudication. A federal reserved water right is created when an Act of Congress or a Presidential Executive Order or Proclamation sets aside federal land from the public domain for a specified purpose. This includes National Forests, National Parks, Fish and Wildlife Refuges, some BLM lands, Indian reservations, and others. The water right has the priority date of the reservation of the land, even though the water right might not be used at that time. The water right includes the amount of water necessary to accomplish the specified purpose for which the land was reserved.

By state law a negotiated settlement must be enacted by the Montana Legislature, be approved by federal officials, and go through an objection process in the Montana Water Court. After objections to all claims (including objections to the Compact) are resolved, the Water Court issues a final decree for all water rights in each basin, including the reserved rights in the negotiated settlement.

The RWRCC is composed of nine members: four appointed by the Governor; two appointed by the President of the Montana Senate; two appointed by the Speaker of the Montana House of Representatives; and, one appointed by the Attorney General.

RWRCC members that are on the Negotiating Team for Forest Service issues are:

- Former state senator Lorents Grosfield, Negotiating Team Chairman
- Senator Bill Tash
- Former Park County Attorney Tara DePuy
- Chris D. Tweeten, Chief Civil Counsel, Office of the Attorney General, RWRCC Chairman.

Members of the Forest Service Negotiating Team are:

- Kathleen McAllister, Deputy Regional Forester, Missoula
- Eric Johnston and Tim Sullivan, Forest Service, Missoula
- Jody Miller and Lois Witte, Office of General Counsel, Missoula and Denver
- Jim DuBois, United States Department of Justice, Denver.

Because of the vast geographic scope of the National Forest System lands in Montana (20% of the land, with water in 50 of the 85 Water Court Basins), settlement of Forest Service water rights is an important part of completing Montana's water adjudication in a timely and cost effective way.

PROPOSED COMPACT

In general, the Compact recognizes reserved water rights for the Forest Service for administrative and emergency fire fighting uses and instream flows for the South Fork Flathead Wild and Scenic River. To resolve major differences between the negotiating parties concerning the existence, nature and extent of any possible reserved water rights for instream flows under federal law, the proposed Compact uses state law to create numerous state-based water rights for instream flow on National Forest System lands and to set up a process for applying for additional instream flows under state law. Below is a summary of what the proposed Compact does.

Federal Reserved Water Rights.

- Recognizes a reserved water right to divert water for the Forest Service for administrative uses (such as for ranger stations, pack stock, road watering) and for emergency fire suppression. Priority date is date of the creation of the National Forest or as specified.
- Recognizes an instream flow right for the South Fork Flathead Wild and Scenic River. Priority date is October 12, 1976, the date this river was designated by Congress.

Instream Flows under State Law.

- Creates, in the Compact, instream flow water rights under state law for 77 streams and one in-place water right for a fen (wetland) all located on National Forest System lands. All of these water rights will have a priority date of 2007.
- Establishes a process that the Forest Service may use in the future to apply for additional instream flows under state law on other streams throughout the National Forest System lands in Montana. Priority date will be the date of application.
- In exchange for water rights created and the means of acquiring instream flows under state law, the Forest Service will withdraw forever all of its existing or possible claims for reserved water rights for instream flows in the ongoing water adjudication.

As part of the overall agreement, the parties have agreed to seek changes to state law that:

- Continues the ability of the Forest Service to object in the Water Court to any water right claim on or crossing National Forest System lands that adversely affects Forest Service interests.
- Coordinates state and federal permitting processes.
- Allows a change of use from an appropriation to divert or withdraw water on land owned by the Forest Service above or immediately adjacent to the National Forest boundary to an instream flow. This is primarily intended to allow the Forest Service to change irrigation and other rights to instream flow on land that it might acquire in the future.

This Compact settles all federal reserved water rights of the Forest Service. The Forest Service has other water use claims based on state law that are in the adjudication process and are not part of this agreement (for example, campgrounds are not "specific purposes" for which forest service land was originally reserved).

Public Input

All negotiating sessions are noticed and open to the public. In the fall of 2006, public meetings were held in 17 communities. Meetings with interested individuals and groups were held. A web site was created. Written comments via mail or e-mail were encouraged. *All comments* on this Compact were considered by the negotiating teams.

The following are some of the changes made to the agreement based on public comment:

- Additional streams were included in the Compact. Approximately 57 streams where appropriate data was available were added to Article V based on public input that more instream flow rights should be quantified in the Compact. 77 instream flows are now included in the Compact. These streams were added prior to the general public meetings.
- Concerns were expressed about the priority for administrative uses on lands not originally part a Forest unit, but reserved by later Congressional action. Language was added in Article II, section A.1., to clarify that if a current administrative use has a later priority date, the abstract for that water right will specify the later date.
- Concerns were raised about Forest Service water use for road watering and road construction. Article III, section C.3 now specifies that senior water rights cannot be adversely affected by Forest Service use and withdrawals will cease if affecting seniors.
- Many people and groups commented on a proposed change to § 85-2-233, MCA concerning the Forest Service's ability to object in the adjudication based on land ownership. Based on these comments the proposed changes to this provision were dropped and language put in the Compact that recognized the Forest Service's ownership interest in water and its use within National Forest System lands.
- Concerns were raised that instream flow rights would prevent changes from a direct stock use to an off-stream stock use (even if the Forest Service required riparian protection). Now the Forest Service cannot object to changes in this limited circumstance.
- Concerns were raised about the use of the wetted perimeter methodology with no flexibility to provide for the evolution of the science regarding instream flow methodologies. Language was added that allows for a new methodology to be used under the Compact if the parties agree to it and it is adopted by rule. Criteria for the reliability of the new methodology include that it be a peer reviewed methodology with a track record and that it be generally accepted in the scientific community. The use must be instream flow for certain fish species.
- Comments were received that proposed changes to § 85-2-316, MCA were too broad and would apply to all existing state water reservations as well as new applications under that section. This provision was amended to limit the statutory changes to the Forest Service.
- Concern was expressed that the Forest Service would not go forward to apply for additional instream flow rights and there was no method to monitor the applications once the Compact was passed. The Compact now includes a requirement that DNRC report to the Environmental Quality Council biennially on the status of the Forest Service applications for state water reservations.

APPENDIX 3

Water Reservation Application for Instream Flow under Article VI, section B of the Montana-U.S. Forest Service Compact

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Senate Natural Resources and Energy Committee
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Water Reservation Application for Instream Flow

FILING FEE: \$ _____
(filing fee as set by Rule)

For Department Use Only

Application No. _____ Basin _____
Date Received _____
Time _____
Rec'd by _____
Fee Rec'd _____
Check No. _____
Refund \$ _____
Date _____

- Use this form to apply for instream flow water reservations allowed under Article VI, section B of the Montana-US Forest Service Compact (Compact).
- A separate application must be submitted for each reach of a water source for which a State water reservation is sought.
- Filing fee should be submitted at the time of application.

1. Applicant Name: U.S. Forest Service

2. Mailing Address: _____
City _____ State _____ Zip _____

Phone Number: _____

Email Address: _____

3. Contact Person: _____

☐ Check, if contact is an attorney

Mailing Address: _____ City _____ State _____ Zip _____

Phone Numbers: Home _____ Work _____ Cell _____

Email Address: _____

NOTE: IF A CONTACT PERSON IS IDENTIFIED AS AN ATTORNEY, ALL COMMUNICATION WILL BE SENT ONLY TO THE ATTORNEY UNLESS THE ATTORNEY PROVIDES WRITTEN INSTRUCTION TO THE CONTRARY.

4. Source of water supply:

Stream Name: _____

Tributary to: _____

Basin Number: _____

5. Purpose (check one): _____ beneficial use to maintain a minimum flow of water for fish
_____ other (if other, use Form No. 610B – Application for
Reservation of Water – Instream Uses)

6. Need (check one): _____ instream flow needed for fish
_____ other (if other, use Form No. 610B – Application for
Reservation of Water – Instream Uses)

7. Amount of instream flow applied for: _____ cubic feet per second (cfs)

- Methodology: _____ WETP (Wetted Perimeter)
_____ approved methodology; specify _____
(requires approval as described in Article VI, section B of Compact)
_____ other; specify _____
(use Form No. 610B – Application for Reservation of Water –
Instream Uses)

- Provide evidence that the methodology is appropriate for the stream reach.

Attach documentation or explain: _____

- Fish species present (check):

_____ Bull Trout
_____ Westslope Cutthroat Trout
_____ Columbia River Redband Trout
_____ Yellowstone Cutthroat Trout
_____ Arctic Grayling
_____ T&E Species -- specify: _____
date listed: _____
_____ other -- specify: _____
(if other, limited to lower inflection point)

Proof of population present in the stream:

Attach documentation or explain: _____

- Provide evidence that methodology was accurately applied:

Data Collection:

- Location of wetted perimeter quantification point :
 - Latitude _____ Longitude _____;
 - _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ Section _____ Township _____ N/S
Range _____ E/W _____ County
Lot _____ Block _____ Tract No. _____
- If quantification point is not close to the downstream end of reach, explain why it is a suitable representation of the downstream end of the reach: _____

- Flows measured:
 - Date _____ cfs _____
 - Date _____ cfs _____
 - Date _____ cfs _____
- Attach spreadsheet that includes all applicable data.

Data Analysis:

- Name of computer program used for analysis; _____
 - Number of cross sections used: _____
 - R-square analysis of rating curves: _____
 - Inflection point chosen: _____ Upper inflection point
_____ Lower inflection point
 - Attach wetted perimeter graphs showing inflection point
- Attach a list of persons involved in developing information used in preparing the application, including a statement of education, qualifications, and experience for all persons involved with collecting and analyzing data used to determine the wetted perimeter method inflection points.

8. Physical Water availability:

- Estimated mean annual flow _____ cfs.
- In an attachment, describe any additional flow information, such as mean monthly flow, that is available and explain methodology.

9. Location of downstream end of reach:

_____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ Section _____ Township _____ N/S
Range _____ E/W _____ County
Lot _____ Block _____ Tract No. _____
(downstream end cannot extend downstream from national forest boundary)

10. Location of upstream end of reach:

_____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ Section _____ Township _____ N/S
Range _____ E/W _____ County
Lot _____ Block _____ Tract No. _____

Indicate whether the upstream end of reach is headwaters, a property boundary, a tributary, etc. _____

11. Length of stream to be protected: _____ (feet).

12. Legal Description of Stream Reach to be Protected (indicate the legal description of each parcel along the entire stream reach. Attach additional pages if necessary).

_____ 1/4 _____ 1/4 _____ 1/4	Section _____	TWP _____	N/S RGE _____	E/W County _____
_____ 1/4 _____ 1/4 _____ 1/4	Section _____	TWP _____	N/S RGE _____	E/W County _____
_____ 1/4 _____ 1/4 _____ 1/4	Section _____	TWP _____	N/S RGE _____	E/W County _____
_____ 1/4 _____ 1/4 _____ 1/4	Section _____	TWP _____	N/S RGE _____	E/W County _____
_____ 1/4 _____ 1/4 _____ 1/4	Section _____	TWP _____	N/S RGE _____	E/W County _____

13. Map:

Attach a map, and clearly identify the following items on the map: north arrow, scale, section corners and numbers, township and range numbers, quantification point, place of use (reach of stream to be protected), and property ownership of the place of use. A U.S. Geological Survey quadrangle map or equivalent topographic map with minimum scale of 1:24000 is recommended.

14. Public Interest:

This application is in the public interest if it is otherwise correct and complete because under the Compact an application that is otherwise correct and complete establishes a prima facie showing of public interest that can only be overcome by an objection based on a projected development that satisfies the requirements of Article IV, section B.3.(b) of the Compact.

15. Affidavit:

I declare under oath that the information provided for this application is, to the best of my knowledge and belief, true and correct. In submitting this application, I acknowledge that I serve in a representative capacity for the United States Department of Agriculture, Forest Service.

Applicant's Signature: _____ Date _____
(signature of Forest Service Representative)

Name: _____
(typed or printed name of Forest Service Representative)

Title: _____
(title of Forest Service Representative)

Address: _____
(address of Forest Service Representative)

Phone number: _____

Subscribed and sworn before me this _____ day of _____, 20_____.

Notary's Signature _____
(Typed, Stamped, or Printed Name of Notary)

Notary for the State of _____
Residing at _____
My commission expires _____

Submit the application and filing fee to the
Department of Natural Resources and Conservation
Water Resources Division, Water Rights Bureau
1424 Ninth Avenue, PO Box 201601, Helena, Montana 59620-1601.